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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 765

WILSON & CO., INC., SWIFT & COMPANY, AND ARMOUR AND COMPANY,

Petitioners.

vs.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, BELL SYSTEM ASSOCIATED COMPANIES, AND WESTERN UNION TELEGRAPH COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

	PAGE
Opinions below	2
Jurisdiction	2
Questions presented	2
Constitutional and statutory provisions involved	3
Statement	3
Reasons for allowance of writ	
ex parte participation	8
insufficient notice	13
Conclusion	18
Appendix A—Constitutional and statutory provisions	19
B—Opinion of Court of Appeals	21
C—Decree of Court of Appeals	42
D—Affidavits admitting ex parte participation	44

CITATIONS.

Cases.

In re All Am. Cables & Radio, 36 F. C. C. 691 (1964)	13
In re American Tel. & Tel. Co., 37 F. C. C. 689 (1964)	13
In re American Tel. & Tel. Co., 35 F. C. C. 149 (1963)	13
In re American Tel. & Tel. Co., 32 F. C. C. 337 (1962)	13
Hill v. Federal Power Comm'n, 335 F. 2d 355 (5th Cir. 1964)	15, 16
Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U. S. 123 (1951)	10

Morgan v. United States, 304 U. S. 1 (1938) 8, 9, 10

Morgan v. United States, 298 U. S. 468 (1936) 9

Sangamon Valley Television Corp. v. United States, 269 F. 2d 221 (D. C. Cir. 1959) 8, 10, 11, 12

Willner v. Committee on Character & Fitness, 373 U. S. 96 (1963) 10

Constitutional and Statutory Provisions.

U. S. Const., Amend. V 3, 10

Administrative Procedure Act

§ 2(c), 60 Stat. 237 (1946), as amended, 5 U. S. C. § 1001(c) 12

§ 4(a), 60 Stat. 238 (1946), 5 U. S. C. § 1003(a) 3

§ 5(c), 60 Stat. 239 (1946), 5 U. S. C. § 1004(c) 11

§ 7, 60 Stat. 241 (1946), 5 U. S. C. § 1006 8

§ 12, 60 Stat. 244 (1946), 5 U. S. C. § 1011 12

Communications Act

§ 201(b), 48 Stat. 1070 (1934), as amended, 47 U. S. C. § 201(b) 14

§ 202(a), 48 Stat. 1070 (1934), 47 U. S. C. §202(a) 14

§ 205(a), 48 Stat. 1072 (1934), 47 U. S. C. § 205(a) 3, 7, 8, 14

§ 402(a), 48 Stat. 926 (1934), as amended, 47 U. S. C. § 402(a) 6

§ 409(c), 66 Stat. 721 (1952), as amended, 47 U. S. C. § 409(c) (Supp. V, 1959-63)..... 11

Judicial Review Act

§ 4, 64 Stat. 1130 (1950), 5 U. S. C. § 1034 6

Natural Gas Act

§ 5(a), 52 Stat. 823 (1938), 15 U. S. C. § 717d(a) 8

Miscellaneous.

Rules of Federal Communications Commission, 47 C. F. R. (1964):
§ 0.91 7
§ 1.201-1.282 9

U. S. Administrative Conference, Final Report, Recommendations Nos. 16(1), 19(2) 12

Davis, Separation of Functions in Administrative Agencies, 61 Harv. L. Rev. 389, 612 (1948) 11

Peck, Regulation and Control of Ex Parte Communications with Administrative Agencies, 76 Harv. L. Rev. 233 (1962) 11, 13

S. Rep. No. 752, 79th Cong., 1st Sess. 30 (1945) 12

H. R. Rep. No. 1980, 79th Cong., 2d Sess (1946) 12, 16

Hearings before House Subcommittee on Administrative Practice and Procedure on S. 600 and S. 2374, 86th Cong., 1st Sess. 78 (1959) 11

S. 1663, 88th Cong., 1st Sess. (1963) 13

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners Wilson & Co., Inc., Swift & Company, and Armour and Company pray that a writ of certiorari issue to review the decree entered in the above entitled cause by the United States Court of Appeals for the Seventh Circuit on September 17, 1964.

OPINIONS BELOW.

The Federal Communications Commission's initial decision (A. 1-268),[1] final decision (A. 269-311) and memorandum opinion and order (A. 313-23) are reported in 34 F. C. C. (1963), at 244, 217, and 1094, respectively. The opinion of the Court of Appeals, printed in Appendix B, *infra*, p. 21, is reported in 335 F. 2d 788 (1964). The decree of the Court of Appeals, printed in Appendix C, *infra*, p. 42, is unreported.

JURISDICTION.

The decree of the Court of Appeals, printed in Appendix C, *infra*, p. 42, was entered on September 17, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether agency counsel prosecuting a rate proceeding before the Federal Communications Commission can make *ex parte* presentations to the Commission in that proceeding.

2. Whether a form notice raising every rate issue within the Federal Communications Commission's jurisdiction is too general to give notice of the issues involved in a rate proceeding before the Commission.

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1. "A." references are to the appendix filed by petitioners in the Court of Appeals. Nine certified copies of volume 1 of this appendix consisting of pages 1-471 have been filed with this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The questions presented by this petition involve the Due Process Clause of the Fifth Amendment to the Constitution of the United States; section 4(a) of the Administrative Procedure Act of 1946, 60 Stat. 238 (1946), 5 U. S. C. § 1003(a); and section 205(a) of the Communications Act of 1934, 48 Stat. 1072 (1934), 47 U. S. C. § 205(a). These provisions are printed in Appendix A, *infra*, p. 19.

STATEMENT.

Petitioners are users of private line telegraph service furnished by American Telephone & Telegraph Company and its associated companies ("AT&T") and by Western Union Telegraph Company ("Western Union") and, to a lesser extent, private line telephone service furnished solely by AT&T. (A. 10-11.) Private line service consists of the furnishing of channels and related equipment suitable for continuous transmission of telephonic or telegraphic communications between two or more locations specified by the customer. (A. 11-14.)

Private line telegraph service has been furnished by the communication carriers for more than forty years. Since the inception of such service, the charges therefor have been determined under a form of rate structure which remained substantially unchanged until entry of the orders of the Commission reviewed by the court below. (A. 518, 526, 583.)

Historically the rate structure and rate levels were designed to make private line telegraph service available on a flexible basis which would meet the needs of a variety of customers. Thus, the service was offered on a monthly basis for a minimum period of eight hours per day, one day

per week. The rate structure contained a clock-hour schedule providing for a decreasing hourly rate for service beyond the minimum period and for even lower hourly rates for service during non-business hours. (A. 111-12, 1247.)

The Commission orders in issue, *inter alia*, completely abolished this flexible form of rate structure by requiring the carriers to offer private line telegraph service only on a "full-period" basis, *i.e.*, 24 hours a day, seven days a week. (A. 111-17.) Customers such as petitioners who have no need for full-period service are now required to contract for unwanted service at an over-all increase in charges.[2]

The Commission orders resulted from a general investigation of the rates for private line services precipitated by AT&T's filing of a tariff offering a reduction in rates for private line services for multiple channels. (A. 1277-81.)

[redacted]

Notice of the issues to be considered by the Commission in this investigation was first given by publication in the Federal Register of the Commission's order of March 7, 1956. (A. 341-43.) This order merely recited that the issues were whether the carriers' private line tariffs were lawful and whether the Commission should exercise its power to prescribe lawful tariffs. Subsequently, the Commission entered and published its amendatory order of September 11, 1956, adding a single, specific issue to be considered in the proceeding, *i.e.*, the effect on competition of AT&T's tariff for multiple channel private line services. (A. 345-47.)[3]

During the course of this proceeding the Commission permitted AT&T and Western Union to put into effect,

2. The prescribed rate structure had the effect of reducing the charges for private line telegraph service to the federal government which is the largest user, by far, of full-period private line telegraph service.

3. The time and place of hearing were subsequently established in an order of the hearing officer entered after a pre-hearing conference which also restated the issues as previously published and established procedures to be followed in the proceeding. (A. 351.)

subject to obligation to refund, substantially increased rates for private line telegraph service without, however, making any changes in the minimum-period and clock-hour provisions of these tariffs. (A. 416-19.)

At the time these interim changes in rates were being considered, a number of private line telegraph users other than petitioners sought to participate in the proceeding. In granting intervention the Chief Hearing Examiner prohibited these parties from cross-examining any witness with respect to any evidence theretofore or thereafter produced relating to the cost of furnishing private line service. (A. 386, 387, 390, 391.) This prohibition was appealed to the Commission on the ground that sufficient notice had not been published, but the Commission affirmed the prohibition. (A. 394-405.) Accordingly, in the subsequent course of the proceeding these parties were denied by the hearing officer the right to cross-examine on matters relating to the carriers' costs. (A. 907, 978-79, 1272-76.)

The voluminous record compiled before the hearing officer was certified to the Commission for its initial decision. (A. 4-5.) In its initial decision the Commission ordered, *inter alia*, the elimination of the minimum-period and clock-hour provisions on the ground that they were not cost justified and there had been no showing which would justify a departure from the standard of cost justification. (A. 114-17, 130, 1043.) This was the first indication that changes in these provisions were being considered.

When petitioners discovered the impact of the tariffs prescribed by the initial decision, they sought and were permitted to intervene in the proceeding. (A. 469.) After the filing of exceptions and oral argument thereupon by the parties other than the Common Carrier Bureau, the Commission entered its final decision on January 30, 1963, affirming its initial decision in all substantial respects. (A. 269-312.)

Petitions for reconsideration were thereafter filed by several parties, including petitioners. All of such petitions, except those filed by "the press," were denied by the Commission in its memorandum opinion and order entered May 29, 1963, in which it ordered that the tariffs prescribed by the initial decision be effective on August 1, 1963. (A. 313-23.) In granting the petitions for reconsideration filed by the press, the Commission directed the carriers to continue the old rates in effect for the press in order that the Commission could, in a separate investigation, consider evidence to be submitted on the impact of the prescribed changes in rate structure on the dissemination of news. (A. 325-27.)

Petitioners duly filed in the Court of Appeals their joint petition for review (A. 329) of the aforementioned orders of the Commission pursuant to § 402(a) of the Communications Act, 48 Stat. 926 (1934), as amended, 47 U. S. C. § 402(a), and § 4 of the Judicial Review Act, 64 Stat. 1130 (1950), 5 U. S. C. § 1034, together with their application for a temporary stay and interlocutory injunction of the orders insofar as they affected petitioners' charges for private line telegraph service. A temporary stay and interlocutory injunction of the Commission orders in their entirety were granted by orders of the Court of Appeals entered July 31, 1963, and September 27, 1963, respectively.

After filing their joint petition for review in the Court of Appeals, petitioners learned for the first time that counsel who had represented the Common Carrier Bureau in the proceeding had made *ex parte* presentations to the Commission. In response to petitioners' motion for leave to adduce additional evidence respecting such participation, the Commission filed affidavits, printed in Appendix D, *infra*, p. 44, in the Court of Appeals admitting that all counsel of

record for the Common Carrier Bureau had participated *ex parte* "in the preparation of the orders and decisions issued by the Commission and in the discussion by the Commission of such orders and decisions."

In the evidentiary portion of the proceeding, counsel for the Common Carrier Bureau of the Commission had participated ostensibly as a party. By the Commission's published rules such counsel were charged with the responsibility of initiating the investigation. 47 C. F. R. § 0.91 (1964). By statute the burden of showing the unlawfulness of the challenged rates was theirs. Communications Act § 205(a), 48 Stat. 1072 (1934), 47 U. S. C. § 205(a). In their capacity as advocates such counsel took positions on the many controversies arising in the course of the hearings and conferred informally off-the-record with the various other parties to the proceeding. (*E.g.*, A. 683, 746-49, 1323-36.) However, all open participation by such counsel ceased once the evidentiary portion of the proceeding was closed. No positions or arguments were openly advanced by such counsel in relation to the exceptions to the initial decision nor the petitions for reconsideration of the final decision.

The Court of Appeals for the Seventh Circuit entered its opinion, printed in Appendix B, *infra*, pp. 28-29, 31-34, holding, *inter alia*, (i) that a publication that the lawfulness of tariffs was to be investigated constituted adequate notice and (ii) that *ex parte* participation by agency prosecutors was not prohibited.

Concomitantly with the issuance of its opinion, the court issued an order directing the Government to submit a proposed decree. The proposed decree filed by the Government provided that the rates prescribed by the Commission would be made effective on the first day of the following month, but that the court would retain jurisdiction of the

case to determine what equitable relief should be granted because of the interlocutory injunction. The propriety of each provision of the proposed decree was contested and briefed by the parties, and the provision for retention of jurisdiction was omitted by the court from its decree, printed in Appendix C, *infra*, p. 42, entered September 17, 1964.

REASONS FOR THE ALLOWANCE OF THE WRIT.

I.

Ex Parte Participation.

Simply stated, the issue is the applicability to a rate proceeding of the fundamental procedural safeguard which condemns *ex parte* presentations by an advocate to the decision-maker. The court below held (Appendix B, *infra*, pp. 31-34) that this safeguard does not extend to administrative action such as rate fixing. This decision is in conflict with the decision of this Court in *Morgan* v. *United States*, 304 U. S. 1 (1938), and the decision of the Court of Appeals for the District of Columbia in *Sangamon Valley Television Corp.* v. *United States*, 269 F. 2d 221 (1959).

As a statutory prerequisite to the issuance of a rate order the Federal Communications Commission, like all other federal agencies, must first afford "full opportunity for hearing. . . ." Communications Act § 205 (a), 48 Stat. 1072 (1934), 47 U. S. C. § 205 (a). *Accord, e.g.*, Natural Gas Act § 5 (a), 52 Stat. 823 (1938), 15 U. S. C. § 717d (a). Under the Administrative Procedure Act and the Commission's own rules, such hearing must afford interested parties the opportunity to participate by the introduction of evidence and cross-examination in the compilation of a record which is to be the "exclusive" basis for the Commission's decision. Administrative Procedure Act § 7, 60 Stat.

241 (1946), 5 U. S. C. § 1006; Rules of Practice and Procedure, 47 C. F. R. §§ 1.201-1.282 (1964). In the first *Morgan* decision, *Morgan* v. *United States,* 298 U. S. 468 (1936), this Court described a rate proceeding before the Secretary of Agriculture under the Packers and Stockyards Act, 42 Stat. 159 (1921), 7 U. S. C. §§ 181-229, as follows:

> "A proceeding of this sort requiring the taking of and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a *quasi-judicial* character." 298 U. S., at 480.

In the second *Morgan* decision, 304 U. S. 1 (1938), this Court vacated the rate order issued by the Secretary because the underlying findings had been secretly prepared by and discussed with staff members who had represented the Department of Agriculture in the proceeding. This Court held:

> "The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.' . . . And in equipping the Secretary of Agriculture with extraordinary powers under the Packers and Stockyards Act, the Congress explicitly recognized and emphasized this requirement by making his action depend upon a '*full hearing.*'
>
> * * * * *

> "But a 'full hearing'—a fair and open hearing—requires more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." 304 U. S., at 14-15, 18-19.

While the holding in *Morgan II* was made within the formal framework of construing the statutory requirement of a hearing, that holding was expressly based on the procedural safeguards guaranteed by the Due Process Clause of the Fifth Amendment to the Constitution. This Court has consistently and repeatedly cited *Morgan II* as a constitutional landmark. *E.g., Willner* v. *Committee on Character & Fitness*, 373 U. S. 96, 105 (1963). As Justice Frankfurter carefully noted and documented in discussing the situations in which this Court has held a fair hearing to be a constitutional condition to administrative action, "fair hearings have been held essential for rate determinations. . . ." *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 165 (1951) (concurring opinion).

The Department of Justice has relied upon *Morgan II* in condemning *ex parte* participation in those administrative proceedings in which the Government believes such participation is an evil, even though there is no express statutory prohibition against such participation. Such a representation of *Morgan II* was made by the Department in urging the Court of Appeals for the District of Columbia to vacate an order of the Federal Communications Commission allocating television channels among geographical areas. *Sangamon Valley Television Corp.* v.

United States, 269 F. 2d 221 (1959), *decision following proceedings on remand*, 294 F. 2d 742 (1961).[4]

In *Sangamon* the court adopted the position of the Department of Justice that *ex parte* presentations by interested parties to the Commission vitiate its action. The court held that in the "resolution of conflicting private claims to a valuable privilege . . . basic fairness requires such a proceeding to be carried on in the open." 269 F. 2d, at 224.

There is no meaningful distinction between the type of *ex parte* participation condemned in *Morgan II* and *Sangamon* and that which occurred here. The court below did not suggest any distinction. The writers on administrative procedure interpret *Morgan II* as prohibiting in rate proceedings the very *ex parte* participation which occurred here. *E.g.*, Davis, *Separation of Functions in Administrative Agencies*, 61 Harv. L. Rev. 389, 401, 612, 642-43, 655 (1948); Peck, *Regulation and Control of Ex Parte Communications with Administrative Agencies*, 76 Harv. L. Rev. 233, 260 (1962).

The real and indisputable significance of *Morgan II* and *Sangamon* is their recognition that the fundamental procedural safeguards must be extended to a quasi-judicial proceeding such as a rate proceeding even though the Administrative Procedure Act does not so provide.

Although both the Administrative Procedure Act and the Communications Act contain prohibitions against *ex parte* participation, including specifically that by agency prosecutors, these prohibitions do not extend to "rule making" as defined in the Administrative Procedure Act.[5] The Ad-

4. The Department's brief in *Sangamon* has been reprinted in Hearings before House Subcommittee on Administrative Practice and Procedure on S. 600 and S. 2374, 86th Cong., 1st Sess. 78, 82-83 (1959).

5. Administrative Procedure Act § 5(c), 60 Stat. 239 (1946), 5 U.S.C. § 1004(c); Communications Act § 409(c), 66 Stat. 721 (1952), 47 U.S.C. § 409(c) (Supp. V, 1959-63).

ministrative Procedure Act's definition of "rule making" covers almost all regulatory action, including the prescription of rates. § 2(c), 60 Stat. 237 (1946), as amended, 5 U. S. C. § 1001 (c).

The Administrative Procedure Act provides that "nothing in this chapter shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law." Administrative Procedure Act § 12 (60 Stat. 244 (1946)), 5 U. S. C. § 1011. The legislative history of the Act indicates that this precaution was dictated, at least in part, by congressional awareness that the prohibition against *ex parte* participation must be extended to rule-making cases involving sharply contested issues of fact. S. Rep. No. 752, 79th Cong., 1st Sess. 30 (1945); H. R. Rep. No. 1980, 79th Cong., 2d Sess. 30 (1946).

The Court of Appeals for the District of Columbia in *Sangamon* has already held that the procedural safeguards imposed by the Administrative Procedure Act must be supplemented in certain "rule making" proceedings.

Some of the federal regulatory agencies, however, including the Federal Communications Commission, apparently have chosen to regard the Administrative Procedure Act as the ultimate required of them. In an effort to correct this abuse, numerous bills to prohibit *ex parte* participation have been considered by the Congress. The problem of *ex parte* participation has been the subject of prolonged congressional hearings at each session of Congress since 1958. Peck, *Regulation and Control of Ex Parte Communications with Administrative Agencies,* 76 Harv. L. Rev. 233, 234 (1962).

The Administrative Conference of the United States, established by Executive Order 10934, April 13, 1961, in

its Final Report, December 15, 1962, recommended that *ex parte* communications to the Commission by parties to the proceeding, including participating staff members, be prohibited. Recommendations Nos. 16(1), 19(2). Yet attempts to amend the Administrative Procedure Act to so provide have proven futile. *E.g.*, S. 1663, 88th Cong., 1st Sess. (1963.)

Once again it falls to this Court to restate the general guidelines apparently needed by Congress and the administrative agencies to deal properly with this basic and recurring problem.

This case presents this Court with the opportunity to consider for the first time the extent to which the Administrative Procedure Act accurately defines the type of administrative proceedings in which such fundamental procedural safeguards as protection from *ex parte* participation must be afforded.

II.

Insufficient Notice.

Section 4(a) of the Administrative Procedure Act, 60 Stat. 238 (1946), 5 U. S. C. § 1003(a), printed in Appendix A, *infra*, p. 19, requires that notice of proposed rule making be published in the Federal Register stating, *inter alia*, "either the terms or substance of the proposed rule or a description of the subjects and issues involved." The court below held that this requirement is fulfilled by the publication of a "form" used by the Commission in rate cases of every conceivable type[6] and so general as to raise

6. *E.g. In re* American Tel. & Tel. Co., "Regulations and Charges for Wide Area Telephone Service," 37 F.C.C. 689 (1964); *In re* All Am. Cables & Radio, "Multiple Leased Teleprinter Channel Charges Between Miami, Fla., and San Juan, P.R.," 36 F.C.C. 691, 692 (1964); *In re* American Tel. & Tel. Co., "Regulations and Charges for Developmental Line Switched Service," 35 F.C.C. 149, 167 (1963); *In re* American Tel. & Tel.

every conceivable rate issue within the Commission's jurisdiction.[7] The court's only explanation for holding such a

Co., "Regulations Relating to Connections of Telephone Company Facilities with Certain Facilities of Customer," 32 F.C.C. 337, 338 (1962).

7. The unlimited scope of the Commission's order of March 7, 1956 (A. 342-43), which the court below held to be adequate notice, is shown by the following comparison of the statement of issues of that order with the statutory provisions defining the lawfulness of tariffs and the Commission's jurisdiction to order lawful tariffs:

March 7, 1956 Order	Statute
"1. Whether the above mentioned tariff schedules will subject any person or class of persons to unjust or unreasonable discrimination or give any undue or unreasonable preference or advantage to any person, class of persons or locality, or subject any person, class of persons or locality to any undue or unreasonable prejudice or disadvantage within the meaning of section 202(a) of the Communications Act of 1934, as amended.	§ 202(a) "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services . . . or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."
"2. Whether any of the charges, classifications, regulations or practices contained in the above mentioned tariff schedules are or will be unjust and unreasonable within the meaning of section 201 (b) of the Communications Act of 1934, as amended.	§ 201(b) "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable. . . ."
"3. Whether the Commission should prescribe just and reasonable charges, classifications, regulations, and practices or the maximum or minimum or maximum and minimum charges to be hereafter followed with respect to the services governed by the tariff schedules under investigation herein, and, if so, what charges, classification, regulations and practices should be prescribed."	§ 205(a) "[T]he Commission is authorized and empowered to determine and prescribe . . . the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed. . . ."

notice adequate was its assertion that this "was as specific as the Commission could have made it at the time." Appendix B, *infra*, p. 29.

Whether the parties to a rate proceeding are entitled to notice of the issues actually involved or only a general statement covering every issue within the agency's jurisdiction and whether the required notice is dependent on the agency's awareness of the issues at the initiation of a proceeding are questions basic to the continuing administration of the Administrative Procedure Act which have not been, but should be, considered by this Court.

The decision of the court below on these questions is in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Hill* v. *Federal Power Comm'n*, 335 F. 2d 355 (1964), and with the literal language of the statutory requirement of notice, the obvious purpose of that requirement and the legislative history of its enactment.

The Administrative Procedure Act expressly provides that either the proposed action or the issues involved must be stated. These are set forth as equivalent alternatives. The obvious purpose of the requirement of notice is to put interested parties such as ratepayers in a position effectively to exercise their rights to participate in the proceeding of which notice is required to be given.

The legislative history of the enactment of the notice requirement of the Administrative Procedure Act shows that Congress had this goal specifically in mind. The House Committee on the Judiciary, in reporting the bill which became the Administrative Procedure Act, stated:

> "The provisions respecting the fullness of notice apply whether or not, under the terms of the section, it must be published in the Federal Register. *Notice must fairly apprise interested persons of the issues involved, so that they may present relevant data or argument. . . . Statements of issues in the general*

statutory language of legislative delegations of authority to the agency would not be a compliance with the section. Prior to public procedures agencies must conduct such nonpublic studies or investigations as will enable them to formulate issues, or where possible to issue proposed or tentative rules for the purpose of public proceedings." H. R. Rep. No. 1980, 79th Cong., 2d Sess., 24 (1946). (Emphasis supplied.)

Clearly a notice which does not in any manner distinguish the issues actually involved from the infinite number of conceivable issues says nothing. The number of conceivable issues pertinent to the lawfulness of tariffs so complicated that they cover thousands of pages is in every real sense infinite. In the instant case lightning happened to strike the clock-hour and minimum-period provisions of the tariffs. Under the Commission's all encompassing notice it could have struck anywhere in any manner. How could the interested parties exercise their rights to present evidence in support of these provisions and to challenge and clarify the evidence on which the Commission subsequently relied in expunging them when there was not the slightest indication that these long-standing provisions were to be considered?

The decision of the court below permitting the application of unexpected standards to unexpected subjects in the rate structure is in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Hill* v. *Federal Power Comm'n*, 335 F. 2d 355 (1964). In that case the court vacated an order of the Federal Power Commission in a rate proceeding under the Natural Gas Act, 52 Stat. 822 (1938), as amended, 15 U. S. C. § 717c(e) (Supp. V, 1959-63), on the ground that it was based on criteria that had not been announced prior to the close of the evidentiary portion of the proceeding. The court held:

"[I]n the informed, expert judgment of the Commission based upon its long struggle, experience has dem-

onstrated the impossibility of contriving a single test or series of tests by which to measure 'just and reasonable' rates. Courts have extended, and continue to give, the Commission almost a free hand. . . . But investing the Commission with such wide latitude imposes a correlative burden on the Agency. . . . [*P*]*rocedurally it must make sure those who are to be judged by the standard evolved to meet the exigencies of that particular case are advised of it in time to have a fair opportunity to meet it.*" 335 F. 2d, at 363. (Emphasis supplied.)

The ruling of the court below that more adequate notice was not possible is belied by the availability of procedures which can be utilized to define and publicize issues in advance of the close of the record. The House Report, *infra*, pp. 15-16, explicitly directed the agency to conduct such informal investigations and studies prior to the initiation of the formal proceeding as will enable it to formulate the issues. In *Hill* v. *Federal Power Comm'n*, the court held that the evidentiary portion of the proceeding should be conducted in stages with an initial stage to present evidence in aid of the formulation of the issues and a subsequent stage to present evidence on the issues so defined.

These possibilities and variations thereof indicate that it is feasible to develop and utilize procedures which will accommodate the rights of interested parties to adequate notice. The Commission's continuing use of its general form as notice without any regard to the peculiarities of each individual proceeding evidences a callous indifference to the rights of the interested parties.

A decision by this Court on what type of notice must be given will extend far beyond the confines of this case to, at the very least, all federal agencies governed by the Administrative Procedure Act.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel.

APPENDIX A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Administrative Procedure Act of 1946 § 4, 60 Stat. 238 (1946), 5 U. S. C. §1003.

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—.

(a) General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3)

either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules or agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

* * * * *

Communications Act of 1934 § 205(a), 48 Stat. 1072 (1934), 47 U. S. C. § 205(a).

Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS

for the Seventh Circuit.

No. 14269 SEPTEMBER TERM, 1963 APRIL SESSION, 1964

WILSON & CO., INC., SWIFT & COMPANY, and ARMOUR AND COMPANY, *Petitioners,*

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents.*

AERONAUTICAL RADIO, INC., THE WESTERN UNION TELEGRAPH COMPANY, and AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*, *Intervenors.*

On Petition to Review Orders of the Federal Communications Commission.

August 14, 1964

Before KNOCH, KILEY and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* This petition for review, filed pursuant to section 402(a) of the Communications Act of 1934, 47 U. S. C. § 402(a), and section 4 of the Judicial Review Act of 1950, 5 U. S. C. § 1034, seeks to invalidate the orders of the Federal Communications Commission prescribing rates for private line telephone and telegraph

services furnished by American Telephone & Telegraph Company and associated companies[1] and Western Union Telegraph Company.

Private line services furnish channels for the transmission of communications, at monthly rates, between locations specified by the customer. These services provide the customer continuous communication without the necessity of the carriers establishing a connection for each call or message. The basic components of private line services include: intercity channels which connect a central office of the carrier in one city with a central office in another city, local channels which connect the central office with the customer's premises, and equipment for communicating over the channels.

The Commission's order resulted in an aggregate decrease in AT&T's rates for private line telephone service and an aggregate increase in rates for private line telegraph service furnished by AT&T and Western Union.

Petitioners Wilson & Co., Inc., Swift & Company, and Armour and Company are three meat packing concerns which use both private line telegraph and telephone services. They intervened in the rate proceeding after the Commission had issued its initial decision. They challenge the Commission's final order insofar as it increases the rates for telegraph service.

AT&T, Western Union, United Press International, Inc., American Newspaper Publishers Association, Inc., and Aeronautical Radio, Inc., have been allowed to intervene in the review in this court. Western Union, in whole, and United Press International and American Newspaper Pub-

1. Associated companies refers to the Bell System which consists of twenty-one state or regional operating companies, nineteen of which are wholly or principally-owned subsidiaries of AT&T. In the other two companies, AT&T has a substantial minority interest.

lishers Association, in part, support the Commission's final order; the others ask that it be set aside.

The administrative proceeding.

In 1955 AT&T filed proposed tariff schedules with the Commission offering reduced rates for multiple channel private line service. Western Union filed a protest against the reduction. It claimed that the reduction would have an adverse effect on its private line business. The Commission ordered the suspension of the reduced rates and instituted an investigation of them. It notified AT&T that the carrier had to demonstrate that the new channel rates were justified by the costs of furnishing the various private line services.

While the proceeding was in recess pending AT&T's completion of the cost study, the Commission in March 1958 broadened its investigation to include all private line services offered by AT&T and Western Union except those furnished radio broadcast stations, television stations, and broadcast networks.

During this investigation, the General Services Administration, an intervenor representing the United States, petitioned the Commission to reduce AT&T's charges for private line telephone service, alleging that the carrier's cost study revealed that AT&T was deriving an excessively high rate of return. The Commission in June 1958, in granting GSA's petition in part, directed AT&T to reduce its private line telephone rates by not less than $5,700,000 per year, finding that "the charges of AT&T . . . for private line services using telephone grade channels are unjustly and unreasonably high and should be reduced." At the same time the Commission found that AT&T's return for private line telegraph services was only 2.6 per cent as of 1955 and 1.7 per cent as of 1957. The

Commission observed that the telegraph rates of both AT&T and Western Union "may be inadequate to provide the respondents with a fair return."

Thereafter, AT&T and Western Union in August 1958 requested interim relief by filing revised tariffs increasing their private line telegraph rates. GSA and twenty private line telegraph users who intervened at this time (not including petitioners) objected to the proposed rates. These tariffs were subsequently withdrawn because the Commission found that the record did not support the proposed modifications even though some increase in rates was warranted.

AT&T and Western Union filed substitute tariffs in October 1958 for private line telegraph rates. The Commission conditionally authorized the rates to go into effect on December 2, 1958, subject to section 204 of the Communications Act of 1934, 47 U. S. C. § 204, requiring the carriers to keep an account of the amounts collected so that the Commission, in its final decision, might order refunds. Under the revised interim tariffs, the level of private line earnings of both AT&T and Western Union increased to about 5.9 per cent.

The administrative record was closed in September 1959. The hearing officer in January 1960 certified without decision the record to the Commission in accordance with the Commission's direction. The Commission's initial decision was filed July 6, 1961. The decision prescribed a complete revision of the rate structure for all private line telephone and telegraph services furnished by AT&T and Western Union. A number of users requested the Commission to reconsider, including petitioners who intervened in the administrative proceeding after the Commission had issued its initial decision.

All petitions for reconsideration were denied except those

filed by American Newspaper Publishers Association and United Press International. The Commission said that the petitions of the press raised "substantial questions regarding the impact which changed private line telegraph and . . . telephotograph rates . . . would have upon the dissemination of news information." The Commission excepted the press from its final order and inaugurated further investigation to determine if the new rates would "impair . . . the dissemination of news." As to all other users of private line telephone and telegraph services, the Commission ordered the rates prescribed in its initial decision to be effective as of August 1, 1963.

The Commission's decision and order.

Except for the exemption granted the press, the final decision, dated May 29, 1963, affirmed without significant modification the initial decision. The order increased the carriers' rates for private line telegraph service and decreased AT&T's private line telephone rates.

The Commission discussed extensively AT&T's and Western Union's cost studies, as adjusted by the Commission. It was the opinion of the Commission that the cost of providing services constituted the most reliable criterion available to determine reasonable and nondiscriminatory rates. The Commission said that it would regard costs either as directly controlling or as reference points from which to measure the extent of any departure therefrom based on other rate making considerations.

The Commission concluded that the proper level of private line earnings was 9 per cent for Western Union and 7.25 per cent for AT&T. It held, however, that it could not prescribe rates for Western Union which would give it a 9 per cent overall level of earnings because the evidence indicated that AT&T had lower costs for the service

and to permit Western Union to obtain a 9 per cent return would require either raising Western Union's rates so high as to be noncompetitive or raising AT&T's rates above the level necessary to obtain a 7.5 per cent overall return. The Commission found both solutions undesirable because the "ratepayers are entitled to benefits from competitive service offerings by the carriers," and it was determined to avoid "burdening the ratepayer with higher rates for complete telegraph servic. than would otherwise obtain if AT&T were the ole carrier." Accordingly, the Commission authorized Western Union to charge rates which if charged by AT&T would permit it to earn at a 7.25 per cent level, thereby limiting Western Union to a 6.4 per cent level of earnings. The Commission concluded that the prescribed rates should result in reasonable earnings for both carriers.

The Commission affirmed its conclusion reached in its initial decision that it must prescribe specific rates for competitive units of private line telegrap. services rather than to permit, as AT&T urged, the carriers to set their own rates as long as their total returns did not exceed the levels found reasonable.

Finally, the Commission eliminated the clock-hour schedule and minimum period rate provision. AT&T and Western Union had provided private line telegraph service to customers on a monthly contract basis for one or more days a week and for a minimum period of eight hours a day. Daily charges were scaled down as the number of days of service per week increased. As the number of hours of use per day over eight increased, the rate per hour decreased. Superimposed upon this rate structure was the clock-hour schedule, which divided the day into four periods and established a different rate per hour within each period. The period with the highest rate covered the normal business day, 9 a.m. to 6 p.m. The

lowest rate applied to the period between 12 a.m. and 6 a.m.

Abolishing both the minimum period provisions and the clock-hour schedule, the Commission imposed the requirement that all private line telegraph service should be offered on a continuous monthly basis, seven days a week, twenty-four hours a day. The Commission found that, "[T]here is little, if any, difference in the cost of furnishing service during the day or night." Furthermore, the Commission noted that ordinarily telegraph channels furnished for daytime-only leases were not used by another customer at night. Concerning the minimum period provisions, the Commission held that "differences in the rates for minimum period and continuous services are not justified by cost differences" since the costs of providing continuous service has not been substantially greater than for minimum period service.

Petitioners attack the final order, claiming procedural errors on the part of the Commission, and, on the merits, contending that the order is not supported by adequate findings or the record.

Procedural aspects.

Petitioners challenge the Commission's order on the procedural grounds that they did not receive adequate notice of the proceeding, that the participation by the Commission's Common Carrier Bureau counsel in the decision of the agency violated the Communications Act of 1934, the Administrative Procedure Act, and the Commission's own rules of practice, and that the Commission erroneously denied ratepayers the right to cross-examine witnesses on the issue of the carriers' cost of service.

We disagree with the Commission that petitioners waived their right to raise these questions in this court

for failure to raise them in the administrative hearing. We do not think petitioners had to raise the issues of adequacy of notice and the right of cross-examination as long as these issues were raised by a party to the proceeding during the hearing. The reason for the rule that such questions should not be raised initially in the court of review is that the administrative agency ought to have the opportunity to rule on the questions in the first instance. *Hennesey* v. *SEC*, 285 F.2d 511 (3d Cir. 1961).

Petitioners did not object at the administrative hearing to the ex parte participation by Commission counsel in the decision of the Commission but have raised the issue by affidavits for the first time in this court. We think the affidavits properly present the question. Cf. *Massachusetts Bay Telecasters* v. *FCC*, 261 F.2d 55 (D.C. Cir. 1958); *WKAT, Inc.* v. *FCC*, 258 F.2d 418 (D.C. Cir. 1958). We are not persuaded by the argument of the Commission and AT&T that petitioners were on notice during the hearing that such participation might occur and hence should have filed their objections with the Commission.

We turn to the merits of these issues.

Notice.

The issue is raised whether the final order is invalid because the Commission's notice in the Federal Register announcing the investigation of the carriers' private line rates failed to apprise interested parties or the public of the issues to be considered in the hearing. Petitioners contend that there was no "description of the subjects and issues involved" as required by sections 2(c) and 4(a) of the Administrative Procedure Act, 5 U.S.C. §§ 1001(c), 1003(a); the notice "described the issues solely in the language of the Communications Act"; and that even if the initial notice was adequate, there was no notice

of the added issues created during the proceeding in 1958 when the Commission conditionally increased the rates for private line telegraph services and ordered the carriers to account for the increase in order to facilitate possible refunds. Such action, they say, substantially altered the proceeding, requiring notice of the rate hearing in a more specific manner than was given.

The Commission's order of March 7, 1956, published in the Federal Register, enumerated each of the private line rates subject to investigation and stated that AT&T was requested "to conduct a study to determine the cost in furnishing private line services and channels." The Commission noted that "it is desirable to determine in a single proceeding the lawfulness of all tariff schedules applicable to private line services and channels." The notice included as issues to be investigated: whether there existed within the tariffs then in effect unreasonable discriminations or preferences, unreasonable rates, and if the Commission should prescribe new rates. The notice adequately apprised all interested parties of the Commission's intention to conduct a general investigation of the private line tariffs of AT&T and Western Union, of the lawfulness of the carriers' rates, and the possibility of prescription of new rates.

The notice was not, as petitioners contend, a statement of issues in general statutory language of legislative delegation of authority. It was as specific as the Commission could have made it at the time. Accordingly, we hold that the publication was sufficiently detailed to give notice that broad rate adjustments for telegraph services were to be the subject matter of the investigation and, therefore, constituted adequate notice as required by the Administrative Procedure Act. The interim rate increase and the accounting order did not add new issues to the proceeding requiring additional notice although, in fact, the Com-

mission announced the procedure it would follow in determining the lawfulness of the interim rates in a memorandum opinion, dated January 28, 1959, and published in the Federal Register.

We conclude that petitioners' contention of lack of notice is without merit.

Denial of right to cross-examine witnesses.

Three intervenors, General Services Administration, Aeronautical Radio, Inc., and United Press International, participated fully in the administrative hearing. The remaining parties, who intervened prior to the Commission's initial decision, were denied the right to cross-examine witnesses about the carriers' cost of service studies introduced in the hearing. The question is whether this ruling invalidated the order. Petitioners urge that the so-called limited intervenors, as ratepayers, were entitled as of right to cross-examine witnesses irrespective of the lateness of their intervention.

Section 2(b) of the Administrative Procedure Act, 5 U.S.C. § 1001(b), provides: "[N]othing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes." The Commission's rules provide that the Commission may permit intervention "limited to particular issues or to a particular stage of the proceeding."[2] We hold that it is proper for the Commission to consider lateness as a ground for limiting a party to the state of the proceeding at the time he intervenes.

In the circumstances of this case, we perceive no prejudice to these late-filing intervenors resulting from the limitation on cross-examination. The cost phase of the investigation had been substantially completed when they

[2] 47 C.F.R. § 1.104(d) (now § 1.223(d), 28 Fed. Reg. 12426).

intervened. Other ratepayers who intervened early in the proceeding subjected the cost evidence to examination. To have permitted the late-filing intervenors to plow the same ground would only have delayed the hearing unduly.

We do not agree that the Commission's November 25, 1958 order permitting interim rates subject to refund constituted the initiation of a new proceeding that required the Commission to allow the limited intervenors to participate fully. Section 204 of the Communications Act, 47 U.S.C. § 204, provides that, "[I]n case of a proposed increased charge, the Commission may by order require . . . account . . . and . . . refund." In considering the question of possible refunds, the Commission did not institute a new proceeding; it merely added an ancillary question to be considered in the hearing. Consequently, the November 1958 order did not affect the timeliness of the petitions for intervention to give the limited intervenors the right to participate fully.

In their request for leave to intervene, petitioners made no offer to prove or disprove disputed facts. Rather, they limited their objections to the Commission's conclusions drawn from the primary facts submitted to the agency. For this reason alone, their complaint has no merit. Petitioners attempt to assert rights which they claim belong to other parties. We do not believe they should be accorded the rights the limited intervenors may have, resulting from the denial of cross-examination, when petitioners do not claim the right of cross-examination for themselves.

Ex parte participation by agency counsel.

We hold that it was proper for members of the Commission's Common Carrier Bureau who were counsel of record in the hearing before the Commission to partici-

pate in the decisional process that led to the orders under review; and that this conduct did not violate section 3(a) of the Administrative Procedure Act, 5 U.S.C. § 1002(a), sections 409(c) and 205(a) of the Communications Act of 1934, 47 U.S.C. §§ 409(c), 205(a), the Commission's own rules, as well as constitutional due process.

Petitioners' principal argument is that section 409(c) of the Communications Act[3] applied to the instant proceeding because the investigation concerned the validity of rates then in effect as distinguished from prescribing rates to become effective in the future; that the section renders the proceeding an "adjudication" within the meaning of the Administrative Procedure Act. Referring to the Administrative Procedure Act, petitioners point out that section 2(c) of the act, 5 U.S.C. § 1001(c), defines rulemaking as including the "prescription for the future of rates"; since adjudication is defined by section 2(d) of the act, 5 U.S.C. § 1001(d), to be any proceeding not included within the definition of rulemaking, the determination of the validity of rates currently effective is necessarily adjudication; that this interpretation of adjudication is buttressed by section 5 of the act, 5 U.S.C. § 1004.

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[3] Section 409 (c)(3) provided in part:

> No person . . . engaged in the performance of investigative or prosecuting functions for the Commission . . . shall advise, consult, or participate in any case of adjudication (as defined in the Administrative Procedure Act).

On August 31, 1961, section 409(c) was amended, deleting the above subsection. However, section 409(c)(1) incorporated the ex parte participation provisions as follows:

> In any case of adjudication (as defined in the Administrative Procedure Act) . . . no person who has participated in the presentation . . . of such case at the hearing or upon review shall (except to the extent required for the disposition of ex parte matters as authorized by law) directly or indirectly make any additional presentation respecting such case . . . to the Commission, . . . unless upon notice and opportunity for all parties to participate.

Petitioners misconceive, however, the nature of the proceeding before the Commission. The Commission's decisions and final order come precisely within the ambit of section 2(c) of the Administrative Procedure Act; the order prescribes "for the future of rates" and therefore was the result of a rulemaking proceeding. The order is not retroactive because the new rates do not go into effect until the order is operative. The question of the validity of the existing rates was ancillary to the primary question of whether new rates should be prescribed. Adjudication was not included in the administrative process.

Even if the initial proceeding was rulemaking, petitioners maintain that the account and refund provisions imposed by the November 1958 order converted the investigation into an adjudicatory proceeding. Here again, the account and refund provisions were ancillary to the primary proceeding and a part of the rulemaking procedure. The interim order increasing the telegraph rates and providing for contingent refunds was of an interlocutory nature akin to a preliminary injunction. These provisions are discretionary means to save private line telegraph users harmless pending the Commission's determination of whether the future rates should be approved.

Finally, we are of the opinion that the Commission complied with section 3(a) of the Administrative Procedure Act, which provides that, "[E]very agency shall . . . publish in the Federal Register . . . descriptions of its central and field organization; . . statements of the general cause by which its functions are channeled and determined." The Commission published a statement of organization which apprised petitioners that staff members might participate in preparation of the Commission's decision.[4]

[4] Section 0.21(d), 47 C.F.R. § 0.21(d) (now 28 Fed. Reg. 12397), states that the Common Carrier Bureau "assists, advises and makes recommendations to the Commission."

The procedure followed by the Commission and its staff did not run counter to statutory requirements. Moreover, the Commission did not violate its own rules nor did the procedure constitute a denial of due process.

Aside from the claimed procedural defects, petitioners attack the validity of the Commission's decisions and order on their merits.

Rate of return.

Petitioners contend that the Commission's "allowance for return" is excessive, contrary to law, and not supported by evidence. In the Commission's decision the rate of return on the carriers' investments, more precisely the carriers' level of earnings of private line services, was found to be 6.4 per cent for Western Union (adjusted by the Commission from 9 per cent) and 7.25 per cent for AT&T. In making this finding, the Commission used cost of capital as the basic factor. It had concluded from the evidence that the cost of capital of the private line facilities for AT&T was from 6 to 6.5 per cent and for Western Union 7.5 per cent.

Contrary to what petitioners urge, the evidence, when considered in its totality, substantially supports the Commission's findings. Even though the Commission may not have heard expert testimony on the cost studies, a sufficient amount of statistical data was submitted from which the Commission could decide the carriers' cost of capital.

Moreover, the Commission did not go outside the record and depend upon a previous rate case, the so-called *Landline* case, 25 F.C.C. 537 (1958), in arriving at Western Union's cost of capital. What the Commission said was that Western Union's cost of capital (7.5 per cent) was the same as its cost of capital in *Landline*.

In contending that a more extensive cost study should

have been undertaken, petitioners overlook the fact that only segments of the carriers' operations were under investigation. The criteria in determining the reasonableness of rates for a particular segment of a utility's operation are different from the criteria to be applied when the level of earnings of an entire business is considered. *Chicago Board of Trade* v. *United States*, 223 F. 2d 348 (D.C. Cir. 1955). For these reasons, we think the Commission correctly adduced that it was unnecessary to make findings or hear evidence in the detail otherwise required for rate of return conclusions.

Using the cost of capital findings as reference points, the Commission also considered the value of AT&T's and Western Union's services to users; risk of discontinuance of service by users for whom costs were incurred in acquiring and constructing specially designed facilities; competition between private line and message services; effect of private line services on the companies' stability; and competitive relationship between private microwave systems and leased services. It was proper for the Commission to consider these factors in determining the carriers' level of earnings.

The Commission noted that private line service is of "great value to users having specialized or bulk communication requirements," and that "private line services derogate from the usage of the message services, which constitute the largest single service offering of each carrier." Although the Commission said that it made some allowance for these factors in determining the level of earnings, it rejected the carriers' claim that these factors warranted a 10 per cent level of earnings for private line services.

Petitioners contend that the Commission's consideration of the value of service to consumers is contrary to this court's holding in *Natural Gas Pipeline Co.* v. *FPC*, 120

F. 2d 625 (7th Cir. 1941), *rev'd on other grounds*, 315 U. S. 575 (1942). That case, however, dealt with the entire business of the utility, not a particular segment. Although we said there that the value of service to the users is not "a reasonable rule," we also said that "the rate of return not only may, but in a utility case, must be, the *largely* determinative factor of reasonableness." (Emphasis added.) The Commission followed the rule enunciated in that case in the instant proceeding Value of service was only one of the factors used to determine a reasonable level of earnings.

We disagree with petitioners' contention that a consideration of the factors (other than the cost of capital) would result in a conclusion contrary to what the Commission found. Rather, we are convinced that the Commission's consideration of these factors in conjunction with cost of capital could reasonably have resulted in the finding that the level of earnings for AT&T was 7.25 per cent and for Western Union 9 per cent, adjusted to 6.4 per cent.

Cost allocation.

Petitioners contend that the Commission erred in allowing rate increases on the basis of cost allocation not supported by adequate findings or by the evidence; that the increase was based in major part upon AT&T's cost study which allocated to private line telegraph service a disproportionate amount of high-cost facilities and only a de minimus amount of low-cost radio relay facilities.

AT&T uses eight types of intercity circuits that differ in their technical characteristics and vary in average book cost from a low of $19.20 per circuit mile to a high of $174.70. Voice frequency cable has an average book cost of $129.14, K-carrier a cost of $44.82, and radio relay a cost of $19.20. The AT&T cost study as of December 31, 1955 indicated the types and the extent of circuits actually

being used for private line telegraph intercity service. The study showed that 52.4 per cent of its telegraph service was provided by K-carrier, 17.1 per cent by voice frequency cable, and 0.1 per cent by radio relay.

Petitioners say the assignment to private line service of one-tenth of 1 per cent was disproportionate and resulted in increasing the cost of the circuits allocated to private line service by 26 per cent since radio relay circuits constituted 28.4 per cent of the total circuits used by AT&T for all its services as of December 31, 1955. Further, it is petitioners' position that inasmuch as the allocation of the telegraph service furnished by AT&T was based on engineering criteria employed by the company and the Commission said that it was not called upon and the record would not enable it to pass upon the "absolute validity" of the engineering criteria, the Commission did not make findings on the issue of cost allocation; that its failure to do so violated section 8(b) of the Administrative Procedure Act, 5 U.S.C. § 1007(b). Moreover, petitioners say that the evidence establishes that the allocation was contrary to actual usage and, therefore, arbitrary. In support of this proposition, they allege that in order to meet competition from privately-owned microwave systems, AT&T twice reduced its rates for large volume users of telegraph channels, initially by filing the multiple channel tariff in September, 1955, and subsequently by the "telpak" tariff filed in January, 1961;[3] that, "if microwave or radio relay systems were too unreliable for telegraph use, it would have been unnecessary for AT&T to lower its private line telegraph rates to meet competition from such service."

[3] Under the telpak tariff, AT&T offers various private line intercity channels under new rate schedules which provide for a volume discount. That tariff is currently under investigation by the Commission.

The telpak evidence, however, is not in the record, nor was it offered into evidence by petitioners. A judicial review of an administrative order must be based solely upon the record made before the agency. Section 7(a) of the Administrative Procedure Act, 5 U.S.C. § 1037(a); *Radio Corp. of America* v. *United States*, 95 F. Supp. 660 (N.D. Ill. 1950), *aff'd*, 341 U. S. 412 (1951). Consequently, the telpak testimony may not properly be considered in this review.

There is no showing that the Commission abused its discretion in not reopening the proceeding to allow the testimony adduced in *Telpak*. As the Supreme Court said in *ICC* v. *City of Jersey City*, 322 U. S. 503 (1944), there is always a gap between the time the record is closed and the time the agency makes its decision and that, if every new circumstance or fact were to be the basis of a reopening of the administrative proceeding, "there would be little hope that the administrative process would ever be consummated."

In its initial decision the Commission said that in apportioning costs among the several kinds of service provided by a communication carrier the relative use of each service should be considered, and "to the extent that a particular type of plant is used for a particular service in greater proportion than it is used for another service, the relative costs of that type of plant should be reflected proportionately in the costs of furnishing the service in which it has the greater amount of use."

The Commission, however, did not rely on the apportionment of services submitted by AT&T in the cost study without examination. It examined the basis of these assignments to see whether they were arbitrarily made or were reasonably related to the requirements of private line telegraph service. From such examination, the

Commission determined that radio relay was not as reliable for private line services as the more expensive circuits. It also found that the high terminal cost necessary in the use of radio relay made this type of service uneconomical when the distance to be covered was less than 200 miles; moreover, the average length of private line telephone circuits was about 250 miles.

We are satisfied from a consideration of the whole record that the cost allocation found by the Commission was not arbitrary; that it had a rational basis in the evidence; and that it was supported by adequate findings. We think the Supreme Court's observation in *Colorado Interstate Co.* v. *FPC*, 324 U. S. 581, 589 (1945), is apt here: "Allocation of costs is not a matter for the slide rule. It involves judgment on a myriad of facts. It has no claim to an exact science."

Alteration of rate structure.

Petitioners argue that the elimination of the clock-hour schedule and minimum period provision and the exclusion of the press from the new rate structure were arbitrary and not supported by either the evidence or adequate findings.

Petitioners say that the clock-hour schedule and minimum period provision have been included in the tariffs for private line telegraph service furnished by AT&T and Western Union for forty years; that the provisions benefit the normal commercial customer and their elimination would have a severe customer impact. They urge that the Commission failed to consider or make findings concerning customer impact. Further, they question the Commission's conclusion "that the differences in the rates for minimum period and continuous services are not justified by cost differences."

The Commission's avowed reason for these alterations

in the rate structure is that costs should primarily control rates. It found that "costs of providing continuous service are not substantially greater than for minimum period service," that "there is little, if any, difference in the cost of furnishing service during the day or night," and that "ordinarily telegraph channels furnished for daytime-only leases are not placed in service at night."

We are convinced that on the basis of these findings the Commission was warranted in ruling that the private line telegraph rates were "unreasonably discriminatory" and "should be determined independently of the time of day or night in which service is furnished."

AT&T supports petitioners' contention. Although the company concedes that the finding of substantial identity of cost for minimum and continuous service is "fully supported by the evidence," it says that the Commission should have considered customer impact (value of service), and that had it done so, it would not have altered the rate structure.

The Commission, however, was cognizant of the impact on customers. It said: "We are aware that changes in the telegraph rate structure . . . will result in substantial increases to certain customers and in reductions to others." There is no indication in the record that the carriers would lose customers to other services or that the customers would be significantly affected economically by these changes. The weight to be given customer impact by the Commission in these circumstances is a matter for expertise competence and is discretionary.

It is also urged that the Commission acted arbitrarily in continuing the proceeding to determine whether special rates should be prescribed for the press. However, section 201(b) of the Communications Act, 47 U.S.C. § 201(b), sanctions this procedure. That section provides: "[C]om-

munications by wire or radio subject to this chapter may be classified into day, night, . . . commercial, *press*, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications." (Emphasis added.)

In staying the operation of the new rates as applied to the press, the Commission said: "On the basis of the record made in these proceedings . . . we are unable to evaluate the extent to which such changed [private line telegraph] rates, if applied to the press, would impair the widespread dissemination of news information." In support of this statement, the Commission said that it was "in the public interest to institute a separate investigation . . . to determine whether the imposition of the same charges applicable to other users would significantly impair the widespread dissemination of news information." In view of section 201(b) which gives the Commission discretion to place the press in a different rate classification and the agency's statement, the Commission's action was not arbitrary or discriminatory.

We find no error in the other rate changes about which complaint is made nor do we think it necessary to discuss them.

The petition to set aside the Commission's orders is denied.

APPENDIX C.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

WILSON & CO., INC., SWIFT & COMPANY, and ARMOUR AND COMPANY, *Petitioners,* *vs.* UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents.*	No. 14269 On Petition to Review Orders of the Federal Communications Commission.

DECREE.

September 17, 1964.

This cause came to be heard on the Joint Petition to review and set aside orders of the Federal Communications Commission, and the transcript of the record from the Federal Communication Commission, and was argued by counsel.

On consideration whereof, it is ORDERED, ADJUDGED and DECREED that the orders of the Federal Communications Commission leased on July 14, 1961, January 30, 1963, and May 29, 1963 in FCC Docket Nos. 11645 and 11646 be, and the same are hereby AFFIRMED, and that the Joint Petition to set aside the said orders be, and the same is hereby DENIED, in accordance with the opinion of this Court filed August 14, 1964.

It is further ORDERED, ADJUDGED and DECREED that the above-mentioned orders of the Federal Communications

Commission and the tariff schedules filed pursuant thereto by intervenors American Telephone & Telegraph Company and the Western Union Telegraph Company shall become effective on the first day of the month following the date of this decree.

It is further ORDERED, ADJUDGED and DECREED that the Interlocutory Injunction entered by this Court on September 27, 1963, shall continue in effect through the last day of the month in which this Decree is entered and shall thereupon be dissolved.

WIN G. KNOCH,
United States Circuit Judge.

ROGER J. KILEY,
United States Circuit Judge.

LUTHER M. SWYGERT,
United States Circuit Judge.

A True Copy:
Teste:

Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX D.

Affidavits attached to Opposition of the United States and the Federal Communications Commission to Petitioners' Motion for Leave to Adduce Additional Evidence.

[U. S. Court of Appeals, Seventh Circuit, Case No. 14,269.]

AFFIDAVIT.

DISTRICT OF COLUMBIA: ss.

Bernard Strassburg, being duly sworn, deposes and says:

1. That he is employed as Chief of the Common Carrier Bureau of the Federal Communications Commission;

2. That he appeared as counsel of record for the Common Carrier Bureau in the private line proceeding in F.C.C. Docket Nos. 11645 and 11646, and he participated in that proceeding;

3. That he participated in the preparation of all decisions and orders issued by the Federal Communications Commission in the private line proceeding and in the discussion with the Commission of such orders and decisions;

4. That based upon his own knowledge the following persons, no longer employed by the Commission, participated as counsel of record in the private line proceeding and in the preparation of the orders and decisions issued by the Commission and the discussion by the Commission of such orders and decisions:

a. Robert E. Conn
b. Ford P. Mitchell

[Signature and notarization dated January 10, 1964 omitted.]

[U. S. Court of Appeals, Seventh Circuit, Case No. 14,269.]

AFFIDAVIT.

DISTRICT OF COLUMBIA: ss.

William M. Lesher, being duly sworn, deposes and says:

1. That he is employed as Chief, Legal and Tariff Branch, Rates Division of the Common Carrier Bureau of the Federal Communications Commission;

2. That he appeared as counsel of record for the Common Carrier Bureau in the private line proceeding in F.C.C. Docket Nos. 11645 and 11646, and he participated in that proceeding;

3. That he participated in the preparation of all decisions and orders issued by the Federal Communications Commission in the private line proceeding and in the discussion with the Commission of such orders and decisions.

[Signature and notarization dated January 13, 1964 omitted.]